

**MSB Financial, MHC
1902 Long Hill Road
Millington, NJ 07946**

October 12, 2011

VIA E-MAIL

Ms. Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Attention: Docket No. R-1429; RIN No. 7100 AD 80

Re: August 11, 2011 Interim Final Rule: Savings and Loan Holding Companies
Provisions of Regulation MM Affecting Dividend Waivers by Grandfathered
Mutual Holding Companies

Dear Ms. Johnson:

MSB Financial, MHC, Millington, New Jersey, a federal mutual holding company ("MSB MHC"), hereby submits comments to the Board of Governors of the Federal Reserve System (the "Federal Reserve") on the provisions of the Regulation MM, as included in the referenced Interim Final Rule ("IFR") issued by the Federal Reserve on August 11, 2011, relating to the waiver of dividends by mutual holding companies ("MHCs") that are subject to grandfathered treatment as to dividend waivers ("Grandfathered MHCs") under the provisions of Section 625 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203 (the "Dodd-Frank Act"). This comment letter addresses the provisions of the IFR set forth at 12 C.F.R. Section 239.8(d).

Most critically, we are concerned that the IFR's requirement of an annual vote of members of a grandfathered MHC¹ as a pre-condition to such MHC's waiver of dividends will force MSB MHC either to spend an excessive sum to seek to obtain an annual vote of depositors or, to discontinue its regular dividend payments to the minority stockholders of its subsidiary mid-tier holding company, MSB Financial Corp. ("MSB Financial"). Our concerns with respect to the IFR's requirement are particularly acute as a result of the relatively small size of our insured depositor institution, Millington Savings Bank (the "Bank"), which has total assets of approximately \$350 million.

¹ MSB MHC qualifies for grandfathered regulatory treatment of dividend waivers pursuant to Section 10(o)(11)(D)(iii) of the Home Owners' Loan Act (the "HOLA"), 12 U.S.C. § 1467a(o)(11)(D)(iii), as added by Section 625 of the Dodd-Frank Act, as its subsidiary holding company completed its minority stock offering on January 4, 2007 and has paid regular dividends to its minority shareholders every quarter beginning with the quarter ending December 31, 2007, in each case following the waiver of dividends by MSB MHC.

Our specific comments with respect to the requirements of Section 239.8(d) of Regulation MM follow. As set forth below, we believe that Regulation MM's annual member vote requirement is inconsistent with MSB MHC's Charter and Bylaws and that its imposition by the Federal Reserve is contrary to the Congressional intent behind Section 625 of the Dodd-Frank Act. Furthermore, such annual vote requirement is unduly burdensome to the MHC and interferes with the safe and sound on-going operations of the MHC, MSB Financial and the Bank. Finally, we feel strongly that the Federal Reserve, like the Office of Thrift Supervision ("OTS") before it, should defer to the judgment of the individual boards of directors of Grandfathered MHCs in their determinations of whether a proposed dividend waiver is consistent with such boards' fiduciary duties to the members of their MHCs.

- 1. The annual member approval requirement imposed by Section 239.8(d)(2)(iv) of Regulation MM is inconsistent with the Charter and Bylaws of MSB Financial Corporation, MHC, which do not provide for members or grant voting rights to depositors.**

MSB MHC's Federal Mutual Holding Company Charter provides that the management and affairs of the mutual holding company shall be under the direction of the board of directors. Unlike most federally chartered MHCs but like New Jersey-chartered mutual savings banks, MSB MHC has no members. Instead, the directors of the company are elected at an annual meeting of the board of directors, and the depositors of the Bank do not have any voting rights as depositors except for the right, provided by New Jersey law, to vote to approve a mutual-to-stock conversion transaction. The Bylaws of MSB MHC specify that the board of directors has the authority to "exercise any and all of the powers of the mutual company not expressly reserved by the charter to the depositors."

In that MSB MHC has no "members" and MSB MHC's Charter and Bylaws do not grant any voting powers to the Bank's depositors, it appears that the Federal Reserve's proposed requirement that MHC members must annually approve a Grandfathered MHC's board action to waive dividends as a pre-condition to the Federal Reserve's consideration of such a dividend waiver request is inconsistent with the existing Charter and Bylaws of MSB MHC.

- 2. Regulation MM's annual member vote requirement is contrary to the intent of the Dodd-Frank Act.**

- A. The member approval requirement is an additional substantive requirement not contemplated by Section 625 of the Dodd-Frank Act.**

While the authority of the Federal Reserve to set standards for the form and substance of the dividend waiver resolutions adopted by the board of directors of a Grandfathered MHC is undoubted, we believe that the requirement of Section 239.8(d)(2)(iv) of Regulation MM that such resolutions reflect the annual adoption of a resolution by the members of a Grandfathered MHC exceeds the Federal Reserve's authority in Section 10(o)(11)(C) of the HOLA. The Federal Reserve's authority to determine the "form and substance" of the dividend resolutions

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adopted by a Grandfathered MHC's board of directors does not, we submit, include the power to impose a separate, onerous condition of requiring an annual member vote which approves the MHC board's determination as a pre-condition of the MHC requesting a waiver of the dividend.

Furthermore, the annual member vote requirement of Section 239.8(d)(2)(iv) cannot be justified as being essential to a Grandfathered MHC board's resolution regarding the consistency of dividend waivers with the board's fiduciary duties to the members. We believe that such a board resolution can be based on a variety of factors and, furthermore, that Congress's recognition of a Grandfathered MHC board's discretion in the matter of its fiduciary duties to the Grandfathered MHC's members is implicit in Section 10(o)(11)(D) of the HOLA.

- B. The effect of Section 239.8(d)(2)(iv)'s annual member approval requirement is to terminate all dividend waivers by Grandfathered MHCs and, as such, is contrary to the clear intent of the Dodd-Frank Act's grandfathering provisions.

The Congressional intent behind the grandfathering provisions of Section 625 of the Dodd-Frank Act was to permit Grandfathered MHCs to continue to waive dividends in accordance with the past practice and procedures of the OTS. Congress was well aware of the Federal Reserve's historic opposition to dividend waivers and included grandfathering provisions in Section 625 to ensure that Grandfathered MHCs would continue to be able to waive dividends following the Transfer Date under the same rules as before. This intent is shown both (a) by the provisions of HOLA Section 10(o)(11)(D), referenced above, providing that the Federal Reserve "may not object to a waiver of dividends" by a Grandfathered MHC that satisfies certain minimal requirements and (b) by Section 10(o)(11)(E) of the HOLA, which continues for Grandfathered MHCs the former OTS rule that waived dividends would not be considered in determining the appropriate exchange ratio in the event of a full conversion to stock form. In view of the Dodd-Frank Act's specific protection of the dividend waiver authority of Grandfathered MHCs, we believe it to be clear that a regulation which makes it unduly burdensome for such companies to waive dividends is inconsistent with the intent of Congress.

- 3. The annual member vote requirement is unduly burdensome in terms of potential costs to the MHC in that such costs may be approximately \$125,000+ per year associated with printing, mailing, proxy solicitation and legal expenses, which amount represents approximately 50% of the current dividends paid annually by the mid-tier subsidiary corporation.**

The net effect of the Federal Reserve's imposition of an annual member vote to approve dividend waivers would be to eliminate dividend waivers by Grandfathered MHCs altogether. This conclusion results from the extremely high cost for a mutual holding company to obtain a vote of a majority of the outstanding votes of members without the use of "running" proxies (proxies that have been in place for more than a one year period). We have been informed by our investment bankers and our legal advisors that the total cost of obtaining such a vote of the Bank's depositors for an institution our size (assuming that it could be obtained) is estimated to be at least \$125,000 annually. This total includes legal fees, printing expenses, mailing costs and

proxy solicitation expenses. It is our conclusion, and we assume that other Grandfathered MHCs will reach the same conclusion, that an annual expenditure of such size represents a significant expenditure that would be difficult to justify to either the board of directors of the mutual holding company or the shareholders of the subsidiary stock holding company. This expense represents approximately fifty percent (50%) of all dividends paid by MSB Financial to its minority shareholders during the past year. While we assume that the Federal Reserve was unaware of the excessive cost of obtaining member approval of a dividend waiver proposal, the effect of Section 239.8(d)(2)(iv)'s requirement will be to eliminate, or at the very least strongly discourage, continued dividend waivers by Grandfathered MHCs. Frankly, requesting that a majority of members vote to approve a matter for which they likely have no particular interest or direct or indirect stake in the outcome appears to be an additional procedural step being imposed upon Grandfathered MHCs by the Federal Reserve which is both unnecessary and an unreasonable impediment to Grandfathered MHCs' continued ability to waive dividends under the authority of Section 625 of the Dodd-Frank Act.

- 4. The annual member vote requirement will interfere with the ability of MSB Financial to continue to pay dividends to its shareholders as part of its capital management strategies, and will require the MHC either to incur significant expense related to seeking depositor approval of the matter with an uncertain outcome or to incur tax liability on its dividend income if a dividend is paid without an MHC waiver.**

We are very concerned that the IFR's requirement of an annual vote of members of the MHC as a pre-condition to the MHC's waiver of dividends on the stock it owns in its subsidiary mid-tier holding company, MSB Financial Corp. ("MSB Financial"), will require the MHC either to incur significant expenses annually to seek to obtain an annual vote of depositors or to discontinue dividends to the mid-tier company's minority stockholders. The imposition of this annual vote requirement by the Federal Reserve, unless reversed, will disrupt the established capital management strategy of the mid-tier company, which has included the payment of a small quarterly dividend to the minority stockholders of the mid-tier company for a period of 15 consecutive quarters as part of a modest return on investment to the company's minority stockholders.

The annual member vote requirement will interfere with the ability of the mid-tier holding company to efficiently provide a modest dividend return to the minority stockholders by making the payment of dividends by the mid-tier holding company subject to the additional significant costs associated with a proposed annual vote of depositors of the Bank to approve the MHC's waiver of dividends or, alternatively, causing the MHC to incur Federal and State income tax liability on the receipt of dividend income paid on the MHC's stock of the mid-tier subsidiary company (in the event that the requirements for a dividend waiver are not met and a cash dividend is still paid on the MSB Financial stock). Further, we are concerned that such regulation might have the consequence of promoting the selection of members of the board of directors of the MHC who do not own stock of the mid-tier subsidiary company rather than the

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primary criteria being those with the knowledge, skill and service that promotes the safe and sound operation of the MHC and the Bank.

5. Deference should be accorded the business judgment of the MHC board of directors without imposing a member approval vote on such board determination in order to validate such board action.

As set forth below, we feel strongly that the Federal Reserve, like the OTS before it, should defer to the judgment of the individual boards of directors of Grandfathered MHCs in their determinations of whether a proposed dividend waiver is consistent with such boards' fiduciary duties to the members of their MHCs.

While we recognize the authority of the Federal Reserve under Section 10(o)(11)(C) of the HOLA to determine the "form and substance" of the resolutions by a Grandfathered MHC's board of directors approving dividend waivers, it is our belief that the Federal Reserve, in keeping both with its history of non-interference with decisions of bank holding company boards of directors and with the precedent of the OTS regarding MHC dividend waivers, should give deference to the determinations of a board of directors of a Grandfathered MHC as to the consistency of a dividend waiver with the board's fiduciary duty to the members. Furthermore, the fact that depositors do not have voting rights under the Charter and Bylaws of the MHC and in accordance with applicable New Jersey law (as detailed above) is further evidence that the determinations of MSB MHC's board of directors, in particular, should be given deference by the Federal Reserve.

The uniform practice of the OTS was not to object to dividend waivers by boards of MHCs provided that dividends paid to the mid-tier companies' minority shareholders did not exceed net earnings of the mid-tier subsidiary company on an ongoing basis. With that exception, which is based on safety and soundness considerations, the OTS did not challenge the judgment of MHC boards of directors as to the waiver of dividends. We believe that the OTS's position on dividend waivers to have been correct, as dividend waivers do not adversely affect depositors and their members' interest in a mutual holding company. As long as dividends paid to minority shareholders do not exceed net earnings of the mid-tier subsidiary company on an ongoing basis so that the aggregate dollar ownership interest in the mid-tier subsidiary company and related subsidiaries does not decrease below the amount that existed at the time of the initial minority stock offering, there should be no requirement on the part of the MHC to seek to increase the equity amount of the MHC itself.

We do not question the authority of the Federal Reserve to specify in Regulation MM the substance of the resolutions to be adopted by Grandfathered MHC boards of directors in waiving dividends. We believe, however, as indicated above, that additional requirements and restrictions on dividend waivers that would have the effect of making waivers impossible, excessively difficult or prohibitively expensive would be contrary to Congress's intent in including the grandfathering provisions in Section 10(o) of the HOLA. As such, we strongly recommend that the requirement for an annual vote of members of the MHC to approve the

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waiver of dividends be removed from Regulation MM as a pre-condition of the MHC's dividend waiver notice to be filed with the Federal Reserve.

6. The annual member vote requirement may be contrary to the safe and sound operation of the MHC and the Bank.

As noted previously, the costs of obtaining the MHC member vote would be a significant annual expense. Since the source of funds for the payment of such expenses will, ultimately, be dividends from the Bank, every dollar paid in connection with the annual member vote will cause the capital of the Bank to be reduced in the same amount. In the alternative, if the MHC were either unable to obtain the requisite vote of members as a pre-condition to obtaining approval to waive dividends, or the MHC elected not to seek such member vote because of the excessive expenses associated with seeking such vote, then any dividend income paid by the mid-tier subsidiary company to the MHC would be subject to Federal and State income tax liability and would thereby reduce the capital strength of the mid-tier subsidiary company and the Bank. In either case, the payment of such expenses by the MHC would diminish the ability of the MHC and the mid-tier company to serve as a source of strength to the Bank and would adversely affect the capital position of the organization. In addition, as noted above, if the MHC Board were to determine that in order to permit the MHC Board to have greater flexibility in determining whether or not to elect to waive dividends and to avoid the requirement for an annual member vote, the MHC Board could select directors who are not stockholders of the mid-tier subsidiary company. We contend that such criteria for the selection of directors of the MHC might not fully promote the safe and sound operations of the MHC and the Bank.

As such, with the inclusion of the member vote requirement as a pre-condition for a Grandfathered MHC to apply for a dividend waiver, the consequence of such pre-condition is that the Federal Reserve may be promoting a preference that the directors of the MHC not be parties who otherwise have an equity ownership in the mid-tier subsidiary company. Of course, the MHC board of directors could be comprised solely of directors who do not own stock of the mid-tier subsidiary company. We note, however, that it is not unusual for MHC directors to also have been long-time members of the MHC (as Bank depositors) and stockholders of the mid-tier subsidiary company as well as officers and directors of the mid-tier subsidiary company and/or the Bank. As such, it appears incongruous that the impact of requiring the MHC member vote might be that it also promotes the appointment of individuals who otherwise have not taken advantage of one of the opportunities of being a member of the MHC (that is, being given a preference to buy stock in the initial stock offering) or who have not otherwise elected to purchase stock of MSB Financial during the past five years. Having all members of the board of directors of the MHC not be stockholders would permit the MHC board to have greater flexibility in determining whether or not to elect to waive dividends without incurring substantial costs or risks of undertaking the member vote. We do not understand how such a regulation which might promote the candidacy of members of the board of directors based upon their absence of personal stock ownership in the mid-tier subsidiary company (rather than their experience and knowledge of the industry and the communities served by the Bank's customers) serves to promote the safe and sound operations of the MHC and the Bank.

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We respectfully submit this comment letter for your consideration in evaluating changes to Regulation MM. Specifically, for the reasons set forth herein, we request that the provisions requiring an annual vote of members as part of the procedure for a Grandfathered MHC to waive dividends be removed from Regulation MM. We appreciate having the opportunity to offer our input on this important matter.

If you have any questions on any aspect of this letter, please feel free to contact me at (908) 647-3030.

Very truly yours,



Gary T. Jolliffe

President and Chief Executive Officer